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MICHAEL RODAK, JR., CLERK

No. 73-781

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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April 5, 1974

SORG/CHICAGO U.S.A.

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Cases

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Premier Industries, Inc. v. *Delaware Valley Financial Corporation*, 185 F.Supp. 694 (E.D. Pa. 1960) 25

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Schoenbaum v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *rev'd. on other grounds*, 405 F.2d 215 (2d Cir. 1969) (*en banc*), *cert. denied*, 395 U.S. 906 (1969) 15

SEC v. *Gulf International Finance Corp.*, 223 F.Supp. 987 (S.D. Fla. 1963) 14

Securities and Exchange Commission v. *Myers*, 285 F. Supp. 743 (D. Md. 1968) 14

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Steele v. *Bulova Watch Co.*, 344 U.S. 280, 284 (1952) 2

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Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) 26

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Evans and Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 8 TEX. INT. L. J. 17 (1973) 22

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-781

FRITZ SCHERK,

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ALBERTO-CULVER COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief for Respondent

STATUTES INVOLVED

In addition to the statutory provisions cited in the Brief for Petitioner, section 10(b) and section 27 of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78aa, are involved herein.

QUESTION PRESENTED

Whether an American investor, defrauded in the United States by a foreign national in violation of section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder, is entitled to an adjudication of its section 10(b) claim in the United States district court

rather than in a foreign arbitration tribunal designated in a general arbitration clause in a contract executed before the violation of the Securities Exchange Act was discovered and before the dispute arose.

STATEMENT OF THE CASE

In submitting a counter-statement of the facts of this case, Respondent proceeds upon the premise that in the present posture of this case, arising solely on the pleadings, affidavits and exhibits of record, the Court should assume the correctness of the allegations of the Complaint and the supporting Affidavits submitted by Respondent. See, *e.g., Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 284 (1952).

The Respondent, Alberto-Culver Company ("Alberto"), is a Delaware corporation with its principal place of business in Melrose Park, Illinois, and is engaged in manufacturing and mass marketing of toiletries and other products. The Defendant and Petitioner, Fritz Scherk ("Scherk"), is a German citizen residing in Geneva, Switzerland.

In extensive negotiations between the parties, Scherk, Scherk's European representative and Scherk's New York attorney came to Melrose Park, Illinois where Scherk and his authorized agents knowingly and fraudulently misrepresented essential facts and purposefully deceived Alberto. (A. 3-10.) Relying on the representations of Scherk and his agents, Alberto purchased from Scherk: (1) all of the outstanding stock of Scherk Enterprises V. Aktiengesellschaft ("SEV"), a Liechtenstein stock corporation which licensed trademarks purportedly owned by it, primarily in Western Europe; (2) Scherk's sole proprietorship located in Berlin, Germany which manufactured and sold cosmetic products primarily in West Germany and

which was called Firma Ludwig Scherk ("FLS"); and (3) Scherk's interest in Lodeva Herstellung und Vertrieb Kosmetischer Artikel GMBH ("Lodeva"), a German limited liability corporation. The SEV stock and the underlying trademarks were the core of the entire transaction. (A. 4-27, 48-53)

Exploratory negotiations between Alberto and Scherk for the sale by Scherk of all or part of the Scherk businesses occurred in 1967 and early 1968. In December 1967 Leonard Lavin, Alberto's president, met in Melrose Park, Illinois, with Benjamin Navon, Scherk's brother-in-law and Berlin plant manager, and discussed with him the nature and background of Scherk's businesses. Navon pointed out to Lavin that, although the "German business" (FLS) had experienced serious financial difficulties in recent years, the "Scherk International Business" (SEV) had earned substantial profits through royalty income derived from its trademark-licensing arrangements. Navon emphasized the importance of the SEV trademark portfolio and the significant amount of trademark royalty income generated. (A. 4, 11, 30, 49-50)

On April 30, 1968, Scherk sent a letter to Lavin offering to come to Melrose Park and conclude an agreement for the sale of virtually all of the Scherk-owned businesses, including SEV:

> "In order to avoid any further misunderstandings and, above all, further delays, I would suggest that my brother-in-law, Mr. Navon should come over to Chicago with our lawyer Mr. Stuart Marks, of Kaye, Scholer, Fierman, Hayes & Handler, 425 Park Avenue, New York. This way a preliminary *agreement on the principles of the deal can be concluded,* leaving legal and other details to the experts.
>
> Although Mr. Navon has my power of attorney to sign and conclude any agreement I could, if you so

wish, come over on shortest notice for signature." (emphasis added) (A. 4, 50, 51, 55-56)

As a result, Scherk and Navon, and Scherk's New York lawyer, Stuart Marks, came to Melrose Park, Illinois, for discussions held at the end of May and in early June, 1968. Scherk's meetings with Lavin and other Alberto representatives extended over a three-day period. (A. 30-31, 50.)

During these meetings in Melrose Park, in justification of his statements that his businesses were worth substantially more than Alberto had been willing to offer, Scherk repeatedly referred to the valuable trademark portfolio owned by the "International Business" (SEV), the great drawing power of the trademarks owned by SEV, and the substantial trademark royalty profits generated by SEV. Scherk emphasized the value of the trademark portfolio to Alberto both for use in connection with Scherk products and as a means of gaining access for Alberto's own products to Germany and other countries. At no time did Scherk or Navon disclose to Alberto that the Scherk businesses lacked good title to the very trademarks under discussion, which were the essence of the securities to be purchased by Alberto. (A. 50-52)

As contemplated by Scherk, agreement on the basic terms of the acquisition, including the price to be paid, was reached in the May-June 1968 meetings in Melrose Park, Illinois. This fact is evidenced by Scherk's own subsequent letter to Lavin dated June 9, 1969, prior to closing, in which Scherk stated:

> "It is more than a year that we last met at *Melrose Park to agree upon a transaction* which will now, at long last, come to its closing.
>
> • • •

> . . . and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close *the deal which I was glad to have agreed to at your office, one year ago.*" (emphasis added) (A. 56, 57)

In November 1968, Stuart Marks, Scherk's New York lawyer, sent to one of Alberto's attorneys in Chicago a telegram and a letter concerning the trademarks. (A. 5-6, 39, 41-44)

The telegram from Marks, dated November 15, 1968, stated the following with respect to trademarks owned by SEV:

> ". . . SEV . . . will have good and merchantable title to all such registrations and to the best of their knowledge information and belief all such marks [are] free and clear of any charges or claims [with] no actions . . . pending . . . [or] . . . threatened with respect to said titles to any such marks . . . ." (A. 5-6, 39, 42)

The letter from Marks dated November 26, 1968, stated:

> ". . . [W]e would of course be willing to add what I mentioned this evening, namely, that no litigation is pending, or, to our knowledge, threatened against Scherk's trademarks, and that the adverse claims, if any, informally made are not such as to materially affect the value of the trademark rights of Scherk." (A. 6, 42-43)

On December 8, 1968, Marks came to a meeting in Chicago for the express purpose of discussing the trademarks. During the meeting, Alberto attorneys addressed to Marks a large number of questions concerning the Scherk trademark portfolio. Marks stated that he had just returned from Germany where he had investigated the status of the trademark portfolio. Marks was asked whether there were any restrictive agreements, opposition proceedings, litigation or other legal proceedings,

past, pending or threatened, with respect to the trademarks other than those previously disclosed. Marks replied that he had checked into the matter in Germany and had determined that there were none. (A. 6, 7-8, 39-40, 45-47)

As Scherk was well aware throughout the negotiations, Alberto was interested not only in marketing the products of Scherk but also in introducing its own products into the European market and that Alberto's ability so to market was dependent upon the integrity and validity of the trademarks being acquired. The District Court noted:

> ". . . Alberto's primary interest in acquiring the trademarks is well documented . . . before the Court. . . . The value and validity of the trademarks, particularly in this transaction, determined the value of the securities to Alberto." (A. 23 to Petition for Certiorari)

In reliance upon the trademark representations of Scherk and his agents, the purchase agreements (the "Agreements") and the long-term promissory notes delivered to Scherk as part of the purchase price were executed by Alberto in Melrose Park in February 1969. The Agreements contained a provision that any disputes which might arise out of the Agreements were to be arbitrated before the International Chamber of Commerce (the "ICC") in Paris, France. The Agreements also specifically provided that the "laws of the State of Illinois, U.S.A. shall apply to and govern the [Agreements, their] interpretation and performance." Each promissory note contained the provision that "[t]his note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes." (A. 5-8, 40, 51-52, 62-68)

As provided in the Agreements between Alberto and Scherk, SEV was transformed by Scherk from one form

of corporation (an "Anstalt") into another form of corporation (an "Aktiengesellschaft") and Alberto purchased the stock of the transformed corporation. By far the greatest portion of the total purchase price paid by Alberto to Scherk was for the capital stock of SEV, the international trademark licensing company. The formal closings under the Agreements occurred in June 1969 in Geneva, Switzerland. (A. 17, 31, 60)

After the acquisition, Alberto discovered that the character, nature and value of the trademark rights as represented and warranted by Scherk[1] differed so materially from their actual character, nature and value as to constitute a failure of consideration. Alberto also learned that these differences were *known to Scherk* during his negotiations with Alberto and that Scherk had deliberately concealed and misrepresented the facts. Known to Scherk and undisclosed to Alberto were (1) numerous agreements granting to others superior rights affecting the marks, (2) agreements restricting or prohibiting Scherk's right to use certain marks, (3) that certain marks were exposed to cancellation because of the failure to use the marks within periods prescribed by statutes, although Scherk had expressly represented to the contrary, (4) that Scherk had previously acknowledged in legal proceedings that others had superior rights to certain marks, (5) that at the time of the negotiations and sale Scherk was a party to numerous legal proceedings in which others were maintaining that they had superior rights to use certain marks, (6) that in one of these proceedings a principal competitor of Alberto was raising a substantial contention that *all* of SEV's international trademark registrations were void. (A. 21-27)

As a consequence, Alberto rescinded the Agreements, tendered to Scherk the stock of SEV and the other prop-

[1] There were 14 pages of express and detailed trademark warranties in the SEV Agreement. (Record Document No. 2)

erties purchased, and, upon his refusal to make Alberto whole, brought the present action again Scherk to enforce rescission under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5. Scherk appeared and moved the District Court to dismiss the Complaint for lack of jurisdiction and for failure to state a claim and, in the alternative, to stay the proceedings pending arbitration. The District Court, in a carefully reasoned opinion (A. 18-33 to Petition for Certiorari), denied those Motions. However, while Scherk's Motions were still under advisement and five months after the lawsuit was instituted, Scherk filed arbitration proceedings against Alberto in Paris, France. The District Court enjoined Scherk from prosecuting the arbitration proceedings after being advised by Scherk's counsel that, unless enjoined, Scherk would continue to prosecute those proceedings. (A. 82-83, 96-100.) The Court of Appeals for the Seventh Circuit affirmed the orders of the District Court, Judge Stevens dissenting. *Alberto-Culver Company* v. *Scherk*, 484 F.2d 611 (7th Cir. 1973)

Before turning to argument of the legal issues, we emphasize that on this appeal, the following determinations of the lower courts are unchallenged by Scherk and must therefore be assumed to be correct:

(1) "The Complaint states a cause of action under Section 10(b) and Rule 10b-5" (A. 24 to Petition for Certiorari);

(2) The "crucial negotiations which led to the consummation of the transaction were held in Melrose Park, Illinois in May-June, 1968" (A. 24 to Petition for Certiorari);

(3) The allegations of the Complaint "would indicate that a serious violation of Rule 10b-5 had occurred within the Northern District of Illinois" (A. 25 to Petition for Certiorari);

(4) "The substance of the allegedly fraudulent activity occurred within the United States" (A. 26 to Petition for Certiorari).

SUMMARY OF ARGUMENT

The issue presented in this case is whether Alberto's claim against a foreign national, Fritz Scherk, for fraudulent acts committed within the United States in violation of section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act")[2] and rule 10b-5 should be adjudicated before the United States District Court or arbitrated before a foreign arbitral tribunal.

It is undenied, and indeed undeniable, that acts committed by Scherk in this country in violation of the Exchange Act have subjected him to the jurisdiction of the District Court, both as to his person and as to the subject matter of the dispute. Further, it is uncontested that the Complaint states a claim under section 10(b) and rule 10b-5. The only remaining issue, therefore, is whether Scherk can avoid the provisions of the Exchange Act, as interpreted by this Court and other courts, declaring void and making unenforceable any agreement purporting to waive rights under that Act, including any waiver of the exclusivity of jurisdiction conferred on the federal district courts by that Act. Because the Exchange Act applies to Scherk and the claims alleged in the Complaint, it necessarily follows that all pertinent provisions of the Act apply, including sections 27 and 29(a).

Section 27 confers "exclusive jurisdiction" on the federal district courts for enforcement of rights arising under the Exchange Act. Section 29(a) renders "void" and unenforceable "*any*" "stipulation" or "provision"

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[2] 15 U.S.C. § 78j(b). Hereinafter citations to the Exchange Act will be sections in the Act itself rather than to sections in the United States Code.

by "*any* person" purporting to "waive" the mandate of exclusive jurisdiction or any other provision of the Exchange Act.

Directly in point is *Wilko* v. *Swan*, 346 U.S. 427 (1953), which held that a general agreement to arbitrate future disputes was "*void*" and unenforceable under section 14 of the Securities Act of 1933 (the "1933 Act"),[3] which contains language substantively identical to that found in section 29(a) of the Exchange Act. The *Wilko* doctrine has regularly been applied to claims arising under the Exchange Act.

The *Wilko* decision is based not only on the mandate of Congress but also on the sound policy consideration that "any person" who has been subjected to securities violations should have access to the courts to enforce his rights. As the Court recognized in *Wilko*, the securities laws are of such importance that they "require the exercise of judicial direction to fairly assure their effectiveness. . . ." (346 U.S. 427, 437)

The securities laws are a vital part of our commercial structure and extend essential and unique protection to a multitude of investors against securities fraud, whether committed by Americans or foreigners. The necessity of protecting against securities fraud committed in this country through effective and proper enforcement of these laws far outweighs any correlative considerations as to the general desirability of promoting international arbitration. The right of an Exchange Act claimant to seek adjudication in a United States district court is an essential aspect of the protections afforded to investors by the securities laws.

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[3] 15 U.S.C. § 77n. Hereinafter citations to the 1933 Act will be to sections on the Act itself than to the United States Code.

Petitioner's contention that the provisions of the Exchange Act and the holding in *Wilko* are overruled by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"),[4] adopted by this country in 1970, is contrary to the provisions of the Convention itself, which explicitly recognize that an agreement to arbitrate shall not be enforced if it contravenes a statute or public policy. Such exceptions to arbitrability are acknowledged throughout the world.

Petitioner further contends that sections 27 and 29(a) of the Exchange Act and the *Wilko* decision should not apply to securities fraud committed by a foreign national. Nothing in the statutes or decisions justifies such a contention. Numerous decisions have held that section 10(b) of the Exchange Act applies to securities fraud committed by a foreign national, where, as in this case, the wrongful acts, in whole or in substantial part, occur in the United States, thereby conferring jurisdiction on the United States courts. Petitioner has not offered any reasoned basis for giving effect to only some, but not all, of the pertinent provisions of the Exchange Act. Indeed, the parties here, both represented by American counsel, specifically agreed that American law would govern their relationship, thereby subjecting themselves to the structure of the American securities laws, including the jurisdictional and "anti-waiver" provisions thereof.

The decision in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), holding enforceable a choice-of-forum provision agreed to between an American and a foreign national does *not* support Petitioner. The *Zapata* decision did *not* involve any statute at all, let alone a very important statute declaring that all rights thereunder are

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[4] [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997. The Convention is implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. § 201, *et seq.*

to be "exclusively determined" by the federal courts and then further declaring "any" waiver to be "void". The Court, in *Zapata,* addressed the very question presented here and stated that a ". . . choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy . . . whether declared by statute or judicial decision." (407 U.S. 1, 15)

Petitioner also contends that the Exchange Act and the *Wilko* decision should not apply to "sophisticated businessmen" and should be limited to situations of "disparity in bargaining power". The limitation which Petitioner argues for is not supported by the language of the Exchange Act or by the *Wilko* decision. Even seemingly "sophisticated businessmen" are vulnerable to securities fraud, and are entitled to the same protection that the securities laws afford to any individual.

What is involved here is an attempt by a foreign businessman to evade the clear mandate of a very important federal statutory structure, erected to give relief for deliberate misrepresentation in the purchase and sale of securities.[5]

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[5] A major premise which Petitioner insinuates throughout his brief is that Alberto has "cloaked a traditional claim for alleged breach of warranties with rule 10b-5" and that parties can avoid arbitration and forum selection by "merely pleading the presence of a securities claim." (Pet.Br., p. 19) These insinuations and charges have no place before this Court and ignore the fact that the district courts have ample powers to dismiss and deal with a party who speciously alleges violations of the securities laws. In this case, after carefully weighing the pleadings and affidavits of the parties, the District Court and Court of Appeals both rejected the factual contentions which Petitioner asserts throughout his brief to this Court. The District Court and Court of Appeals both were sufficiently persuaded of the merits of Alberto's claim that Scherk was denied his request to stay the court proceedings and was enjoined from continuing an arbitration proceeding he had instituted five months after Alberto had filed its action.

ARGUMENT

I.

SINCE THE EXCHANGE ACT APPLIES TO THIS SECURITIES TRANSACTION, THE PROVISIONS OF THAT ACT CONFER EXCLUSIVE JURISDICTION ON THE UNITED STATES COURTS AND RENDER VOID THE GENERAL ARBITRATION CLAUSE INVOLVED IN THIS CASE.

A. To Protect Investors The Exchange Act And Rule 10b-5 Have Been Applied To Securities Transactions Between Americans And Foreign Nationals Where Fraud Has Been Committed Within The United States.

Inherent in Petitioner's argument is a fundamental contradiction. Petitioner acknowledges, as he must, the applicability of section 10(b) of the Exchange Act to this transaction, and indeed Petitioner no longer contests that the Complaint states a cause of action under section 10(b) and rule 10b-5. Petitioner similarly must acknowledge that the Exchange Act has been held to be applicable to foreign nationals for securities fraud committed in the United States. However, although accepting the applicability of section 10(b), Petitioner simultaneously contends that sections 27 and 29(a) of the same Act are not applicable to him. Neither statutory construction nor discernible policy considerations support the contradiction urged by Petitioner that some, but not all, of the provisions of the statute are to be applied. All relevant provisions of the Act should be applied where the foreign

defendant has committed acts which bring him within the coverage of the Exchange Act and the jurisdiction of the American courts. Any other conclusion would not only negate section 29(a) but would also subvert the vital protections afforded by section 10(b), which require judicial direction for effective enforcement of that Act.

Unfortunately, as indicated by recent decisions, the generally beneficial expansion of international commercial activities has at times been accompanied by massive and intricate securities frauds upon American investors and they have sought redress in our courts. The Exchange Act and the decisions enforcing it have been the mainstay in affording the requisite protection. Since the primary purpose of the Exchange Act is to protect the investor, our courts have consistently held that foreign nationals are subject to section 10(b) of the Exchange Act and rule 10b-5 and are accountable in the federal courts for securities act violations committed either in whole or in substantial part within this country to the injury of American investors, and even, in some instances, for fraud committed entirely abroad where an American investor is the victim.[6]

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[6] Travis v. Anthes Imperial Limited, 473 F.2d 515 (8th Cir. 1973); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Investment Properties International, Ltd. v. I.O.S., Ltd., CCH Fed. Sec. L. Rep. ¶ 93,011 (S.D.N.Y. 1971); Roth v. Fund of Funds, 279 F. Supp. 935 (S.D.N.Y. 1968), aff'd, 405 F.2d 421 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969); Securities and Exchange Commission v. Myers, 285 F. Supp. 743 (D. Md. 1968); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966); Fontaine v. Securities and Exchange Commission, 259 F. Supp. 880 (D. Puerto Rico 1960); SEC v. Gulf International Finance Corp., 223 F. Supp. 987 S.D. Fla. 1963); Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94 (1969); RESTATEMENT, SECOND, OF FOREIGN RELATIONS LAW OF UNITED STATES § 17 (1965). Scherk asserts that Alberto-

Such application of section 10(b) of the Exchange Act to foreign nationals has been emphasized by the Court of Appeals for the Second Circuit:

> ". . . We cannot perceive any reason why it [Congress] should have wished to limit the protection to securities of American issuers. The New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada." *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1336 (2d Cir. 1972)

> ". . . Similarly, *the anti-fraud provision of §10(b) . . . reaches beyond the territorial limits of the United States and applies when a violation of the Rules is injurious to United States investors." Schoenbaum* v. *Firstbrook,* 405 F.2d 200, 206 (2d Cir. 1968), *rev'd on other grounds,* 405 F.2d 215 (2d Cir. 1969) (*en banc*), *cert. denied,* 395 U.S. 906 (1969) (emphasis added)

These judicial pronouncements have been noted with approval by law review commentators:

> ". . . Isolated transactions, not part of a regular foreign business in securities, should be subject to the [Securities Exchange] Act *whenever there are sufficient minimal contacts with this nation to justify the exercise of Congressional power.* Whether those contacts exist is primarily a question for the judiciary. . . ." Note, *Extraterritorial Application of the Securities Exchange Act of 1934,* 69 COLUM. L. REV. 94, 111 (1969) (emphasis added)

(Footnote continued)

Culver initiated the first contact with him in Germany. As the Court held in Travis v. Anthes Imperial Limited, *supra,* where the defendant has committed securities fraud within the United States ". . . [I]t is not material who initiated the communications. . . . [C]ommonsense requires the rejection of the argument that a person could freely communicate a misrepresentation . . . if the defrauded party . . . initiated the communication. . . ." (473 F.2d 515, 527)

Any erosion of the right of an American citizen to seek redress under the Exchange Act in the federal courts against foreigners who commit securities frauds within the United States would have detrimental consequences, particularly in these times of expansion of international commerce. Not only would defrauded American citizens lose the effective method of enforcing their rights, but any such erosion would deprive the nation of a significant deterrent against such misconduct. There is no persuasive justification for emasculating the protection afforded to investors under the securities laws by permitting a foreign national who engages in securities fraud within this country to avoid being called to account in the courts of the United States where the statutory purpose and pattern are so well understood and applied.

B. Sections 27 and 29(a) Of The Exchange Act Confer Exclusive Jurisdiction On The United States Courts And Void The General Arbitration Clause Involved In This Case.

Petitioner's brief virtually ignores section 27 of the Exchange Act which confers "exclusive jurisdiction" on the federal district courts for violations of the Act:

> "The district courts of the United States . . . shall have *exclusive jurisdiction* of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." (emphasis added)

Similarly, Petitioner's brief makes no attempt to address section 29(a), the "anti-waiver" provision of the Exchange Act, which renders "void" and unenforceable "*any*" "stipulation" or "provision" by "*any* person" which purports to evade the Congressional mandate conferring exclusive jurisdiction on the United States district courts.

Nor has Petitioner suggested any statutory construction for not applying these provisions to actions against a person who commits securities fraud within this country merely because he happens to be a foreign national or because the victim happens to be a "sophisticated" person. The plain language of section 29(a) of the Exchange Act applies:

1. To "*any* condition, stipulation or provision . . ."
2. ". . . binding *any* person . . ."
3. "to waive compliance with *any* provision of [the Exchange Act]. . . ."

Alberto's alleged waiver of its right to bring a claim in the federal district court is indisputably a "condition, stipulation or provision". The alleged waiver purports to bind Alberto, a company which is indisputably a "person" within the meaning of the Exchange Act. And section 27 of the Exchange Act providing that the district courts of the United States shall have exclusive jurisdiction for suits brought to enforce any liability created by the Exchange Act is indisputably a "provision" of the Exchange Act.

The decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), addressed the precise question here presented and held that section 14 of the 1933 Act voids a general agreement to arbitrate future disputes arising under that Act.[7]

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[7] The Wilko doctrine, formulated in a case involving the Securities Act of 1933, applies *a fortiori* to matters arising under the Exchange Act which contains an "anti-waiver" provision virtually identical to that found in the 1933 Act. The statutory language of the Exchange Act is even more persuasive than the language of the 1933 Act since section 27 of the Exchange Act confers "exclusive jurisdiction" on the federal courts whereas the 1933 Act makes no reference to exclusivity.

The *Wilko* doctrine, declaring certain disputes involving important statutory or public policy rights to be non-arbitrable, has been upheld, not only in securities controversies, but also in disputes arising under anti-trust and patent laws.[8] And as recently as February, 1974, in an action arising under the Civil Rights Act of 1964 (42 U.S.C. §2000(e) *et seq*), this Court proclaimed the "policy against discrimination to be of the 'highest priority'" and held that the right to court adjudication under that statute could not be waived. *Alexander* v. *Gardner-Denver Company*, 94 S.Ct. 1011, 1019 (1974). In that case, *Wilko* was expressly cited with approval and the *Wilko* doctrine was upheld despite the absence of any provision in the Civil Rights Act comparable to the "anti-waiver" provision found in section 29(a) of the Exchange Act.

The Court in *Wilko* took cognizance that the *effectiveness* of our securities laws and the protection to investors afforded thereunder were of the highest importance. The Court decided that ". . . the protective provisions of the Securities Act require the exercise of judicial direction to

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[8] Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55, 62-63 (7th Cir. 1970) (agreement to arbitrate patent claims held invalid); American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (agreement to arbitrate anti-trust claims held invalid). *See also*, Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970); and A. & E. Plastik Pak Co. v. Monsanto Company, 396 F.2d 710, 715-716 (9th Cir. 1968) (both anti-trust). The following cases have applied the Wilko doctrine in disputes arising under the securities laws: Greater Continental Corp. v. Schecter, 422 F.2d 1100 (2d Cir. 1970); Shapiro v. Jaslow, 320 F.Supp. 598 (S.D.N.Y. 1970); Maheu v. Reynolds & Co., 282 F.Supp. 423 (S.D.N.Y. 1967); Pawgan v. Silverstein, 265 F.Supp. 898 (S.D.N.Y. 1967); Stockwell v. Reynolds & Co., 252 F.Supp. 215 (S.D.N.Y. 1965). *See also* U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) (seaman's wage claim); and cases cited at footnote 15 of this brief.

fairly assure their effectiveness. . . ." (346 U.S. 427, 437) The Court also concluded that the proper enforcement and effectiveness of the securities laws ". . . is lessened in arbitration as compared to judicial proceedings." (346 U.S. 427, 435) The Court observed that arbitrators often proceed:

> ". . . without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of . . . statutory requirements . . . cannot be examined . . . and the interpretations of the law by the arbitrators . . . are not subject . . . to judicial review for error in interpretation." 346 U.S. 427, 436

That successful prosecution of a section 10(b) claim almost always requires extensive pre-trial discovery is also self-evident. Yet arbitration does not provide for discovery. Similarly, the wide choice of venue granted by the Exchange Act would be defeated if prior agreements to arbitrate Exchange Act violations were enforced.[9] The infirmities of arbitration were again emphasized in *Alexander* where the Court stated:

> "Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and

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[9] By reason of the infirmities of arbitration, including lack of discovery, lack of effective review, lack of legal expertise of arbitrators, and inadequate protection of the public interest in the development of a known body of law, law review commentators have concluded that compulsory arbitration is inappropriate in the anti-trust field. Pitofsky, *Arbitration and Antitrust Enforcement*, 25 ARB. J. 40, 40-49 (1970) The same considerations are applicable to controversies arising under the securities laws.

> rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 . . . (1956); *Wilko* v. *Swan*, 346 U.S. 427, 435-437 . . . (1953). And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, at 598 . . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." 94 S.Ct. 1011, 1024

The difficulties of assuring a proper hearing of a section 10(b) claim are enormously compounded if this matter is heard by a foreign arbitral tribunal where it is a practical certainty that there will be unfamiliarity with the unique principles of the Exchange Act.

Accordingly, Alberto urges that this Court base its decision on the:

1. well-reasoned judicial authorities which have applied the Exchange Act to foreign nationals where jurisdictional requirements are satisfied;

2. importance of protecting the rights of American investors under the Exchange Act by requiring foreign nationals who commit securities fraud within the United States to be accountable in the federal courts;

3. unambiguous language of the Exchange Act conferring "exclusive jurisdiction" on the federal courts and declaring any attempted waiver to be "void"; and

4. judicial authorities, including both a long-standing as well as a very recent decision of this Court,

which have involved securities, anti-trust, patent and racial discrimination laws, holding a general arbitration clause to be unenforceable where it contravenes a statutory or public policy.

Any one of the foregoing bases, standing alone, justifies a decision upholding Alberto's right to have this securities fraud, committed in the United States, adjudicated in the United States District Court.

II.

NEITHER THE CONVENTION NOR THE FEDERAL ARBITRATION ACT OVERRULES THE PROVISIONS OF THE EXCHANGE ACT OR THE WILKO DOCTRINE.

Petitioner asserts that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act override the provisions of sections 27 and 29(a) of the Exchange Act.[10]

Petitioner's contentions, however, are contradicted by the language and legislative history of the Convention itself. The Convention, in five different paragraphs, ex-

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[10] The agreement in the present case was signed and closed in 1969. The Convention was not ratified until 1970. Hence, the parties here could scarcely have contracted with respect to the Convention. There is no indication in the text of the Convention itself and absolutely *no* evidence that Congress in 1970 intended to make its own ratification retroactive. Under United States law, treaties do not have retroactive effect upon private parties whose relations were established before the treaty came into force. Board of County Commissioners of Dade County, Florida v. Aerolineas Peruanasa, S.A., 307 F.2d 802 (5th Cir. 1962), cert. denied, 371 U.S. 961 (1963). *See also,* Haver v. Yaker, 76 U.S. (9 Wall.) 82 (1869). Thus, even if the Convention by its terms compelled arbitration of securities law violations, which it does not, it could not retroactively affect this case.

plicitly adopts the *Wilko* rationale. The Convention preserves the right to court adjudication:

> where the arbitration concerns "a subject matter [not] capable of settlement by arbitration." (Article II, para. 1; Article V, para. 2(a));
>
> where the "agreement is null and void, inoperative or incapable of being performed." (Article II, para. 3);
>
> where the arbitration is "contrary to the public policy of that country." (Article V, para. 2(b)); and
>
> where "the said agreement is not valid under the law to which the parties have subjected it." (Article V, para. 1(a)).

As the American Arbitration Association (the "AAA") observes in its *amicus* brief, (AAA Am. Br., p. 11) the legislative history confirms that Congress understood that the draftsmen of the Convention had deliberately provided for these exceptions to arbitrability ". . . in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration". (S. Exec. Doc. E, 90th Cong., 2d Sess. 19 (1968)) The decision of the United States to ratify the Convention was subject to the express qualifications found in the language of the Convention. The necessity for preserving the right to court adjudication of certain matters has been long recognized in this and other countries throughout the world.[11]

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[11] For example, French public policy precludes arbitration of questions relating to the sale or mortgaging of goodwill (*fonds de commerce*), bankruptcy, ownership and validity of patents and trademarks, the validity of corporations, and matters affecting the rights of third parties. In Germany, there is no arbitration of "cartel agreements" or "matters pertaining to public law or involving public policy . . . such as divorce, legal incapacity, matters relating to legal status, bankruptcy, and criminal matters." Evans and Ellis, *International Commercial Arbitration: a Comparison of Legal Regimes*, 8 TEX. INT. L.J. 17, 34, 41-42 (1973)

In asserting the Convention as overriding the language of the Exchange Act, Petitioner is, in effect, making an argument far less persuasive than the one rejected by the Court in *Wilko*. Chapter One of the Federal Arbitration Act (9 U.S.C. §101 *et seq.*), which the Court declined to apply in *Wilko*, contained *none* of the broad exceptions to arbitration found in the Convention.[12]

Petitioner's reliance on the Convention also disregards the fact that these parties, both advised by American counsel, specifically agreed that the "laws of the State of Illinois, U.S.A. should apply to and govern this agreement, its interpretation and performance."[13] It follows that the parties must be held to have accepted the applicability of the Exchange Act to their transaction, including sections 27 and 29(a). It further follows, under Article V, paragraph 1(a) of the Convention, that any award entered by an arbitral tribunal would be unenforceable since it would not be "valid under the law to which the parties have subjected it."

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[12] Petitioner's assertions that the Convention "supersedes Wilko" (Pet. Br., p. 7) and that "THE FEDERAL ARBITRATION ACT REQUIRES THAT THE DISPUTE BE ARBITRATED . . ." (Pet. Br., p. 9) grossly distort the clear meaning of the Convention. Moreover, repeals by implication are not favored, United States v. Philadelphia Nat'l Bank, 373 U.S. 321, 350 (1963); and United States v. Borden & Co., 308 U.S. 188, 198-199 (1934), and in the absence of an express repeal of sections 27 and 29(a) of the Exchange Act, it must be assumed that Congress intended that the Convention operate harmoniously with the Exchange Act.

[13] The AAA correctly states that the Illinois law provision "under the supremacy clause . . . becomes the federal law." (AAA Am. Br., p. 13) *See also*, RESTATEMENT, SECOND, CONFLICT OF LAWS §4(1) and comment 4b to §4(1) (1971); Boyer v. Atchison, T. & S. F. Ry. Co., 38 Ill.2d 31, 230 N.E. 2d 173 (1967).

III.

A FAIR ANALYSIS OF WILKO CONFIRMS THAT IT IS NOT LIMITED TO SITUATIONS INVOLVING INEQUALITY OF BARGAINING POWER NOR IS THERE ANY SUCH LIMITATION IN THE LANGUAGE OF SECTION 29(a) WHICH APPLIES EXPRESSLY TO "ANY PERSON".

Petitioner contends that *Wilko* should be limited to situations involving "disparity of bargaining power" and "form contracts", (Pet. Br., p. 13) That contention ignores the express statutory language of Section 29(a) which voids any waiver by ". . . *any* person . . . ."

That the Court in *Wilko* did not intend to so limit its decision is evident from statements found in the majority and dissenting opinions.[14] The Court's framing of the issue and its decision confirm that it intended to proclaim a broad holding, founded on the "anti-waiver" provision in the 1933 Act:

> "The question is whether an agreement to arbitrate a future controversy is a 'condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision' of the Securities Act which Section 14 declares 'void'." 346 U.S. 427, 430

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[14] The majority opinion states that buyers of securities are covered by the securities laws even though ". . . a buyer and seller of securities, under some circumstances may deal at arm's length on equal terms. . . ." (346 U.S. 427, 435) Mr. Justice Frankfurter, in his dissent, observed that the Wilko decision did *not* turn on "overreaching as between parties bargaining not at arm's length", and the dissent further states that the majority opinion pronounces, "the anti-waiver provision of the Securities Act a general limitation on the Federal Arbitration Act." (346 U.S. 427, 440)

The Court decided:

> ". . . Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." 346 U.S. 427, 438

Subsequent judicial decisions have applied the *Wilko* doctrine to transactions involving knowledgeable businessmen in highly complicated transactions.[15]

As this Court stated in *Wilko*, the purchaser of securities operates at an inherent disadvantage. Regardless of the extent of his investigations, he can seldom, if ever, attain the degree of knowledge concerning his potential investment which is possessed by the seller. This most certainly follows where the seller is engaged in a scheme to defraud through misrepresentation and concealment. Even those who are experienced or seemingly experienced

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[15] Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39 (10th Cir. 1973); Pawgan v. Silverstein, 265 F.Supp. 898 (S.D. N.Y. 1967); Premier Industries, Inc. v. Delaware Valley Financial Corporation, 185 F.Supp. 694, 695 n.1 (E.D. Pa. 1960). *See also*, Greater Continental Corp. v. Schecter, 422 F.2d 1100 (2d Cir. 1970). Petitioner has cited Alco Standard Corp. v. Benalal, 345 F. Supp. 14, 24 (E.D. Pa. 1972) and GCA Corp. v. Coler, 1971-1972 CCH Fed. Sec. L. Rep. ¶ 93,339, p. 91,815 (S.D.N.Y. 1972). In neither of these two district court cases was the subject adjudicated, and any observations that the subject was open to debate were at most plainly *dicta*. The other cases cited by Petitioner involve either *post*-dispute arbitration agreements or agreements which are subject to arbitration under the rules of stock exchanges and which under section 28(b) of the Exchange Act are exempted from the anti-waiver provisions of section 29(a) of the Exchange Act. Those situations are not involved here.

are entitled to be protected against securities fraud to the full extent provided in the securities laws, and *Wilko* so recognizes.[16]

The infeasibility of limiting *Wilko* to cases of "disparity of bargaining power" or to the uninformed, as urged by Petitioner, is manifest. Such a limitation would foster uncertainty over whether particular controversies are to be resolved by judicial process or arbitration. In each case the district court would be required to inquire into the relative sophistication of the parties, the disparities in their bargaining power, the manner in which the negotiations were conducted, the effect of the fraud in altering the apparent relationship of the parties, and possibly even the competency and expertise of counsel and other experts retained by the parties. Substantial discovery would clearly be necessary, and in many cases the

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[16] Petitioner also asserts that Wilko involved a "garden variety" securities transaction, while this case does not. (Pet.Br., p. 15) This Court has already approved the view that section 10(b) of the Exchange Act applies broadly and is not limited to "garden variety" frauds. Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971). Petitioner also argues that Wilko should not apply to the Exchange Act, even though section 29(a) of that Act is virtually identical to section 14 of the 1933 Act which was involved in Wilko. The purported reason for this distinction, never before suggested by Petitioner in the lower courts, is that the 1933 Act contains an express private remedy, whereas the section 10(b) remedy of the Exchange Act has been implied by the courts. Petitioner's contention is without merit for it necessarily assumes that Congress intended to foreclose a private right of action for violations of section 10(b). The judicial determination that a private right of action exists under the Exchange Act is obviously founded upon the statute and is now so well established as to be beyond question. Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971); *see, e.g.,* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

district court would actually be deeply enmeshed in the merits of the section 10(b) controversy before it could even decide the question of arbitrability.

Petitioner unwittingly focuses this problem in his Brief (p. 14) when he asserts that "Alberto was well informed on all aspects of this relatively major acquisition." That statement goes directly to the *merits* of the controversy. Alberto was *not* "well informed" of the fact that Scherk lacked good title to the trademarks which he represented that he owned. Had Alberto been "well informed" of that fact, it would not have consummated the transaction.

Petitioner's attempt to read into sections 27 and 29(a) of the Exchange Act any limitation that these provisions do not apply to the "sophisticated" is totally alien to the statutory scheme. As stated in *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville,* 409 F.2d 989 (5th Cir. 1969):

> "This policy argument has neither statutory nor case authority, and it also lacks theoretical merit. Neither Congress nor the Securities and Exchange Commission has indicated that the unsophisticated and the unwary are the only wards of Rule 10b-5. Fraud may also be prepetrated upon the powerful and the sophisticated. *Cf., Roquemore* v. *Ford Motor Company,* 5th Cir., 1968, 400 F.2d 255. Therefore, in view of the fact that gullibility is not the province of any one group, the protections and remedies of the Securities Act are not accorded only to those who fail a battery of information and intelligence tests, but are simply conditioned upon the misrepresentation of material facts." 409 F.2d 989, 992

IV.

THE ZAPATA DECISION SUPPORTS THE WILKO DOCTRINE.

Petitioner relies on the decision in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which held that a choice-of-forum provision agreed to between an American and a foreign national was enforceable. That decision in no way supports his position. The *Zapata* decision did not involve any statute, and particularly not an important federal statute with a provision conferring exclusivity of jurisdiction upon the federal courts and an "anti-waiver" provision. Moreover, recognizing the existence of limitations on the contractual right to select a forum, the *Zapata* opinion directly addressed the question here presented, stating:

> ". . . A contractual choice-of-forum clause should be held *unenforceable* if enforcement would contravene a strong public policy of the forum in which suit is brought, *whether declared by statute or by judicial decision.* See *e.g., Boyd* v. *Grand Trunk W.R. Co.*, 338 U.S. 263 . . . (1949)." 407 U.S. 1, 15 (emphasis added)

This reference in the *Zapata* decision to *Boyd* was particularly appropriate, since *Boyd* was also relied upon and cited in *Wilko*. In *Boyd*, this Court considered the validity of an agreement restricting an employee in his choice of venue in an action arising under the Federal Employer's Liability Act. (45 U.S.C. §51 *et seq.*)[17] This Court upheld the employee's right, granted by statute, to

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[17] The agreement limited the place where an injured employee might bring suit to the county or district where he "resided . . . or where . . . injuries were sustained and not elsewhere." (338 U.S. 263, 264) The Act, however, additionally permitted suit in any district where the railroad was doing business.

sue at any place where the railroad was doing business, although that was prohibited by a choice-of-forum provision contained in such written agreement. In so doing, this Court relied on an "anti-waiver" provision in the statute even less absolute than the one found in *Wilko* and in the instant case:

> ". . . We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of §5 of the Liability Act. 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void. . . .' The contract before us is therefore void." 338 U.S. 263, 265

Thus, the line of authority from *Boyd* to *Wilko* to *Zapata* to the very recent decision of this Court in *Alexander* and the interrelationship of those cases are clear. In the ordinary case, choice-of-forum provisions will be upheld, whether the parties select an arbitral tribunal or a court as the forum for resolution of their dispute. But where, by statutory mandate or judicially declared public policy, claims are reserved to the jurisdiction of the courts, such agreements are "void" and will not be enforced.

V.

THIS COURT'S AFFIRMANCE OF THE DECISION OF THE COURT OF APPEALS AND THE WILKO DOCTRINE WILL NOT INHIBIT INTERNATIONAL COMMERCE. SECURITIES FRAUD COMMITTED WITHIN THE UNITED STATES SHOULD BE ADJUDICATED IN THE UNITED STATES COURTS.

Petitioner's entire argument, in the final analysis, seems to be predicated on the wholly *unsupported* assumption that affirming Alberto's right to adjudicate this

securities fraud in the federal courts will inhibit international business and will wilt the American businessman's ability to compete effectively on the international scene.

It has been suggested that an American businessman may be placed at a disadvantage if, in competing abroad, he has to admit that an arbitration clause he might sign "would be void in his own country." (AAA Am. Br., p. 7) The fact is that such exceptions to arbitrability are common throughout the world. (See footnote 11, *supra*.) If, for example, the hypothetical American businessman is competing with a Frenchman, the latter would have to "admit" that in France certain agreements to arbitrate are "void". It is nevertheless evident that international commerce has burgeoned in such environment, and there is no reason whatsoever to believe that affirmance of the decisions of the courts below will adversely affect the competitive position of American businessmen.

Petitioner's contentions also fail to take heed of the fact that Alberto's suit is founded on a securities fraud committed *in the United States*. Affirmance of the decision below should not affect legitimate international commerce, since the vast majority of international transactions do not involve securities fraud committed within this country. But where securities fraud is committed within the boundaries of the United States, it most certainly should follow that the defrauded investor, whether he be an American or a foreign national, is entitled to the complete protection afforded by the Exchange Act, including access to the United States courts.

Such a holding by this Court that securities fraud committed within the United States will be redressed by the courts, should serve as a deterrent to such misconduct and

afford essential rule 10b-5 protection and remedies to those injured by violations of the Exchange Act, and will be so regarded by American and foreign businessmen in international commerce.

Petitioner's unsupported conjecture that international commerce will be inhibited should not override the Congressional mandate in the Exchange Act, the many applicable judicial authorities, and the paramount policy consideration of protecting investors against securities fraud committed in the United States. We know of no justification, theoretical or practical, for permitting the perpetrator of a securities fraud in the United States to circumvent our courts, which Congress specified as the exclusive forum for deciding such controversies.

CONCLUSION

With careful calculation, Petitioner's brief seeks to substitute emotion for reason by presenting Scherk as the prototype of a legitimate foreign businessman who has been done in while doing business with Americans. Scherk is portrayed as an "unsuspecting foreigner", who having "contracted in good faith," "finds himself the victim of an idiosyncracy of American law". (Pet. Br., p. 20) In reality, as the pleadings and affidavits reveal: (1) Scherk was a more than ordinarily sophisticated foreign businessman, thoroughly accustomed to maneuvering multi-nationally in many countries including Germany, his country of citizenship, Switzerland, his country of residence, and Liechtenstein, the tax haven of the very sophisticated; (2) Scherk knowingly committed securities fraud by misrepresenting the underlying trademarks as being valid and free from serious defects and encumbrances; and (3) Scherk, far from being a victim of American law, was fully represented by American counsel qualified in international

transactions, who by explicit provision of the agreements in issue expressly designated that the agreements would be governed by American law.

Whatever may be the advantages of arbitration in other contexts, it is the statutory policy of the United States to preserve the right to adjudicate in its courts claims arising under the securities laws. Where, as in the instant case, a foreign national comes to this country and defrauds an American citizen in violation of section 10(b) of the Securities Exchange Act of 1934, effective redress requires and presupposes the right of access to the federal forum. Any pre-dispute agreement to waive that right is and should be void.

Respondent respectfully requests this Court to affirm the decisions below.

Dated: April 5, 1974

Respectfully submitted,

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APPENDIX

Securities Act of 1933

Section 14

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934

Section 10(b)

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27

The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity

and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Section 29(a)

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.